

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

BKY No. 04-41707

In re:

Daniel J. Simon,

Debtor(s).

**FULLER, SEAVER & RAMETTE, P.A.'S
OBJECTION TO CONFIRMATION OF PLAN AND
MOTION TO RECONVERT CASE TO CHAPTER 7**

Fuller, Seaver & Ramette, P.A. ("FSR") by its undersigned attorney, does hereby object to confirmation of the Debtor's Chapter 13 plan in the above entitled case. FSR requests that the court enter an order reconverting the case to chapter 7. In furtherance of its position, FSR states as follows:

1. This matter is set for hearing at 10:30 a.m. on December 2, 2004 before the Honorable Nancy C. Dreher, United States Bankruptcy Judge, Courtroom 7 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415.

2. Fuller, Seaver & Ramette, P.A., a creditor, has standing to bring this motion. Its objection to the proposed plan arises under 11 U.S.C. § 1325(a)(3) & (a)(4), FED. R. BANKR. P. 3015, and Local Rules 3020-1 and 3020-3.

FACTS

3. The Debtor seeks an order confirming his chapter 13 plan. FSR submits that confirmation should be denied and the case should be reconverted to chapter 7.

4. The Debtor filed a Chapter 7 petition on March 30, 2004. Randall L. Seaver was appointed as Chapter 7 Trustee ("Trustee"). In his schedules, the Debtor listed \$1,000 per month in gross estimated income. The Debtor's statement of financial affairs, at item 1, stated that he

had “\$2,500 2004 YTD Est. gross.” His Schedule B disclosed no rights to commissions. On July 7, 2004, the Debtor received a discharge. On August 6, 2004, an order was entered approving the Trustee’s 2004 examination of the Debtor.

5. On September 22, 2004, the Rule 2004 examination of the Debtor was conducted. That examination established that at the time the Debtor filed his bankruptcy petition, he was entitled to various first year commissions and renewal commissions on life insurance and other insurance policies sold pre-petition (“Pre-petition Policies”)

6. The Debtor’s rights to those commissions for Pre-petition Policies were not disclosed in his Schedule B.

7. Rather than the \$1,000 disclosed in his Schedule I, it appears that the Debtor’s gross income in the January - March was at least as follows:

January	\$3,577
February	\$3,973
March	\$3,956

Seaver Aff. Ex. 2 at Ex. 10 thereto.

8. Rather than the \$2,500 YTD in gross income which the Debtor disclosed at item 1 of the statement of financial affairs, it appears that he had over \$10,000 gross ytd when he filed.

9. His post-petition gross income for April - August appears to be at least:

April	\$4,258.69
May	\$2,932.26
June	\$4,047.74
July	\$2,691.03
August	\$3,506.54

Seaver Aff. Ex. 2 at Ex. 10 thereto.

His average post-petition monthly gross income through August appears to be about \$3,487.

10. Through non-disclosure of his commission rights to Pre-petition Policies, and his false statements as to gross income at Schedule I and at Item 1 of the statement of financial affairs, the Debtor concealed his true amount of gross income and the source of that income.

11. Since the commencement of the bankruptcy proceeding through September, 2004, the Debtor has apparently received \$11,132.32 in commissions from Continental General on account of Pre-petition Policies. He turned none of those monies over to the Trustee. Seaver Aff. Ex. 2 at Ex. 9 and 10.

12. Since the commencement of the bankruptcy proceeding through September, 2004, the Debtor received over \$7,800 in commissions from Fidelity and Guaranty Life Insurance Company which are, upon information and belief, on account of Pre-petition Policies. He turned none of those monies over to the Trustee. Seaver Aff. Ex. 2 at Ex. 10.

13. At the conclusion of the September 22, 2004 Rule 2004 examination of the Debtor, the following exchange occurred:

MR. SEAVER: Well, I want to make sure this is on the record. Mr. Andresen, these commissions I believe are all property of this bankruptcy estate, I have several cases here that I will give you to that affect, one of them being a 2001 case out of North Dakota it's in re: Swanson decided in December of 2001. I am concerned that those renewal commissions weren't ever disclosed, I believe that the taking of those renewal commissions and commissions on first year policies written pre-petition are all property of the bankruptcy estate and that Mr. Swanson is liable to the estate for those. And I am going to demand here now on the record that Mr. Simon not negotiate any checks that are for the first year premium for policies written before the bankruptcy filing or nor renewal commissions for policies written before the bankruptcy filing, that he not negotiate any more of those checks. I believe they are bankruptcy estate property.

And I am saying this here because I want Mr. Simon to understand that too. Do you understand that, Mr. Simon?

A. No, I don't.

Q. I am telling you that you cannot negotiate those checks because I believe they are bankruptcy estate property. We may have a dispute about that, but that is what I am telling you right now.

. . .

MR. ANDRESEN: You are right. For now it is very clear to me that we need to agree with him that until the bankruptcy court orders otherwise or until you and I reach an agreement with him otherwise that money shouldn't be spent at all because we have to figure out, by getting an order from the bankruptcy court or reaching an agreement with Mr. SEaver that the money is or is not property of the bankruptcy estate.

While the question is raised by the trustee and he has taken the position that the money belongs to the bankruptcy estate the money can't be spent at all, we have to abide by what he is saying. Even though you don't like thinking about what he is saying we are talking about your daily income here, that money can't be spent until we figure out the question that the trustee is raising. That is the agreement he wants to come to. I am sure he is happy hearing me tell you don't spend the money.

MR. SEAYER: If you don't confirm to me right now on the record that you are going to abide by that –

THE WITNESS: I will abide by it, but I am not exactly what it is.

MR. SEAYER (*actually Mr. Andresen*): He is about to tell you, he will get a court order right this minute or in a couple of days that forbids you from spending the money.

THE WITNESS: I will agree to do it, I am still uncertain what it is. You mean like in a few days here, in ten days or so when I get renewal commissions for the month of September from Centennial General, I cannot use that?

MR. SEAYER: That's exactly what I mean. At the –

MR. ANDRESEN: I believe he means starting right now until -- well, until years and years from now, whenever these commissions, renewal commissions that come to you that were written before the bankruptcy case was filed, he wants you to sit on that money and not spend it until we figure out this question.

MR. SEAYER: Well, more than that, that is part of it, Mr. Andresen, I think the prudent thing to do would be perhaps what we did in another case until there's a resolution, one of two things, pay it into your trust account or I put it in my trustee account for this case with the understanding that there is no resolution as to ultimate entitlement, it is just being held while we figure this out or while the court figures it out.

MR. ANDRESEN: Yes, I think the use of your attorney trust account would be most appropriate for this, so language as we agree that the depositing of him putting the money into the attorney trust account wouldn't be in the bankruptcy estate.

. . .

MR. SEAVER: We are back on the record now, while we were off the record we talked about various things on those commissions. I indicated to Mr. Andresen and Mr. Simon for policies written after the bankruptcy was filed the state doesn't claim any interest in those policies. And we agreed, I believe, and I want Mr. Simon and Mr. Andresen to confirm this, that as to renewal commissions and first year commissions for all policies written prior to commencement of the bankruptcy case Mr. Simon, when he receives the direct deposit of premiums for those he will immediately, by immediately I mean that day, write a check payable to Randall L. Seaver, Simon trustee. I will deposit that check into my trustee account for this case, however, it will be without any prejudice to Mr. Simon's rights, defenses, arguments as to my entitlement or his entitlement to that money, it is not an admission of anything by Mr. Simon, it's merely a device by which we are going to hold the money pending resolution of this matter. I indicated to Mr. Andresen I would give him a letter saying these same things; is that accurate?

MR. ANDRESEN: That's accurate. Thanks for putting it on the record of we are establishing that him turning the funds over to you means that he is turning over the funds to your trust account and not turning it over to the bankruptcy estate so that he is not conceding the estate becomes owner of the funds.

MR. SEAVER: It will be go into my bankruptcy trustee account for this case, but he is not conceding to anything, it is kind of a convenience matter.

THE WITNESS: How am I going to survive? Can I get money out of my retirement account?

Seaver Aff. Ex. 2.

14. Rather than turning over any monies to the Chapter 7 Trustee, Debtor retained new counsel and on September 30, 2004 converted the case to a Chapter 13, despite the fact that all of the Debtor's pre-petition debts had been discharged on July 7, 2004.

15. The Debtor's new Schedule I states that he has gross monthly income of \$2,675. His average actual gross monthly income from January - August apparently exceeds \$3,400.

16. The Debtor's plan claims that he has total unsecured debts of \$77,170. However, the Debtor has received a discharge. The Debtor proposes to pay \$115 per month on his plan for a total of \$4,140.

17. Fuller, Seaver & Ramette, P.A. (“FSR”) objects to confirmation of the plan and moves to reconvert the case to one under Chapter 7.

18. The Debtor converted to a Chapter 13 in order to thwart the Chapter 7 trustee from collecting for creditors the commissions which the Debtor had earned on the pre-petition sales of policies but was collecting post-petition. The time of the conversion establishes that the Debtor’s plan is not proposed in good faith as required by 11 U.S.C. §1325(a)(3). In addition, liquidation of assets by the Chapter 7 trustee would result in a greater return than is being proposed by the Debtor under his Chapter 13, and so, the plan is not in the best interest of creditors and cannot be confirmed. 11 U.S.C. §1325(a)(4).

ARGUMENT

19. FSR requests that the Bankruptcy Court deny confirmation of the plan for the following reasons:

A. The plan was not proposed in good faith, as required by 11 U.S.C. §1325(a)(3).

B. The plan proposes to pay less than would be paid if the case were to remain in chapter 7 and the chapter 7 trustee were to liquidate all non-exempt assets. See §1325(a)(4).

RECONVERSION TO CHAPTER 7

20. FSR further requests that the court reconvert this case to Chapter 7 for cause, pursuant to 11 U.S.C. § 1307(c). Such cause is based on the bad faith of the debtor, the inability to obtain confirmation of a plan, and the fact that the best interests of creditors would be served if a chapter 7 trustee were allowed to liquidate all non-exempt assets.

21. FSR may call Randall L. Seaver, the former Chapter 7 trustee to testify. Mr. Seaver will testify regarding his investigation in pursuit of non-exempt assets, and his expectations regarding the amounts to be collected and distributions to be made to creditors if the case were to remain in Chapter 7.

If necessary, FSR will also call the Debtor as a witness. He will testify regarding his commissions, his concealment of those commissions, his concealment of his true gross income in his Chapter 7 case, and his lack of good faith in converting this case to Chapter 13.

FSR may also call Craig Andresen to testify regarding the Chapter 7 case and the Debtor's disclosures.

WHEREFORE, FSR objects to confirmation of the Debtor's chapter 13 plan and requests that the court enter an order converting the case back to chapter 7 for cause, and for such other and further relief as may be just and equitable.

FULLER, SEAVER & RAMETTE, P.A.

Dated: November 2, 2004

By: /e/ Randall L. Seaver
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Attorneys for Fuller, Seaver & Ramette, P.A.

VERIFICATION

I, Randall L. Seaver, the former appointed Chapter 7 trustee in the above case, and attorney for the moving party named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on November 2, 2004

/e/ Randall L. Seaver
Randall L. Seaver

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

BKY No. 04-41707

In re:

Daniel J. Simon,

ORDER

Debtor(s).

At Minneapolis, Minnesota, this _____ day of _____, 2004.

This matter came before the court for hearing on confirmation of the Debtor's Chapter 13 plan and the motion of Fuller, Seaver & Ramette, P.A. for an order converting the case to chapter 7. Appearances were as noted in the record.

Based upon the pleadings, the arguments of counsel, the findings of the court on the record and all the files and records herein, it is hereby ORDERED:

1. That confirmation of the Debtor's chapter 13 plan is denied.
2. This case is converted to chapter 7 and the United States Trustee shall immediately appoint a chapter 7 trustee to liquidate all non-exempt assets.

Nancy C. Dreher
United States Bankruptcy Judge